United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1594

To be argued by
STEVEN M. SCHATZ

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1594

B/3

UNITED STATES OF AMERICA,
Appellee,

—v.—

JOHN DEGRAFFENRIED,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

John Degraffenried appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on December 6, 1976, following a two-day trial before the Honorable Lloyd F. MacMahon, United States District Judge, and a jury.

Indictment 74 Cr. 692, filed on July 11, 1974, charged Degraffenried with forging the endorsement of the true payee on a United States Treasurer's check, in violation of Title 18, United States Code, Section 495.

Trial commenced on December 10, 1975 and concluded on December 11, 1975, when the jury found Degraffenried guilty. Following the jury's verdict, the defendant was released on bail pending sentence, which was set for January 12, 1976. On January 12, 1976, Degraffenried

failed to appear for sentence, and a bench warrant was issued. He was not apprehended until December 3, 1976. On December 6, 1976, Judge MacMahon sentenced Degraffenried to a term of imprisonment of two years with a recommendation that he be sent to a federal facility for the treatment of drug addiction.

Degraffenried is currently serving his sentence.

Statement of Facts

The Government's Case

The Government's proof at trial established that on February 5, 1974, John Degraffenried forged the endorsement of the true payee, "George Knox", on a United States Treasurer's check, that Degraffenried was apprehended at the scene of the crime while attempting to present the check, and that he then fully admitted his participation in the crime charged in the indictment.

On the afternoon of February 5, 1974, John Degraffenried and an associate, Willie Lawrence, entered Rite Check Cashing, an establishment located at 275 West 145th. (Tr. 18-19).* Degraffenried presented to Howard Stein, the president of Rite Check Cashing, a United States Air Force Retirement Check payable to George Knox. (Tr. 19; GX 17). Upon presentment of the check the defendant was asked by Stein for some identification,

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* References to the trial transcript and to Government exhibits are abbreviated as "Tr." and "GX", respectively. References to Degraffenried's brief and appendix are abbreviated as "Br." and "App.".

which Degraffenried did not supply. (Tr. 19). Stein then asked Degraffenried to sign the endorsement again. (*Id.*)* Stein compared the signature card of the true payee, which he had on file, with the endorsements on the check and found them to be incompatible. He then telephoned the postal inspectors. (Tr. 20).**

Approximately five or ten minutes later, Postal Investigators Charles Cooper and Juan Rosa arrived at the check cashing establishment. (Tr. 31, 52). After Investigator Cooper conferred with Stein and had been shown the check and the signature cards, he approached Degraffenried and asked him his name. (Tr. 50). Degraffenried's response that his name was George Knox prompted Cooper to ask the defendant to accompany him to his office. (*Id.*) Cooper and Rosa respectively patted down Degraffenried and Lawrence for weapons and found none. (Tr. 50, 75).

Degraffenried was then taken to the Bronx General Post Office, where, after he was advised of his constitutional rights, he admitted his full participation in the forgery and uttering of the check. (Tr. 52-3, 83-8; GX 2). Degraffenried told Postal Inspector Edward Mackin that he found the check on the stairway at 701 West 145th, the residence of his sister-in-law, that "Billy" Lawrence came over to the apartment and asked Degraffenried for the $9 which he was owed. (Tr. 84). Degraffenried also admitted that he told Lawrence that he had an Air Force check, that Lawrence accompanied Degraffenried to the check cashing establishment and

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* The back of the check already contained the endorsement "George Knox".

** While waiting for the postal authorities, Stein had Degraffenried prepare a signature card in the name of "George Knox". (*Id.*).

vouched for Degraffenried. Degraffenried admitted that he had signed the second endorsement on the back of the check as well as the signature card in the name of "George Knox." (Tr. 85).*

Subsequently, Degraffenried was turned over to agents of the Secret Service who re-advised him of his constitutional rights. Degraffenried reiterated his full complicity in the offense to these agents. (Tr. 102-105; GX 4, 5). Degraffenried then was lodged at the Federal House of Detention for the night.

The next morning, Degraffenried again was advised of his rights by Assistant United States Attorney David Cutner, and, for the third time, admitted finding the check at 701 St. Nicholas Avenue as well as signing the second endorsement. (Tr. 108-9, 123-4). Degraffenried also conceded that Gloria (Degraffenried) had advised him "not to mess with a government check" and that he owed Willie Lawrence money. (Tr. 109).**

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* Degraffenried further told the Postal Inspectors that before he left the apartment he had been told that he would "get locked up if he tries to cash the check." (Tr. 84-5).

** In addition to the eye-witness testimony of the proprietor of the check-cashing establishment, the Government also offered "regiscope" photographs of Degraffenried presenting the check at the check cashing establishment. (Tr. 29; GX 7A). One of the regiscope photographs showed the defendant with a cigarette nonchalantly dangling from his mouth. (*Id.*). It was stipulated that George Knox received the Air Force retirement check in the mail, that he lost it at 701 St. Nicholas Avenue, and that he neither made any endorsements on the check nor did he give anyone permission to endorse or otherwise negotiate the check. (Tr. 15-6; GX 17). It was further stipulated that the check was a genuine obligation of the United States. (Tr. 127; GX 15).

The Defense Case

Degraffenried called three witnesses to support a proffered defense of coercion.

Gloria Degraffenried, the defendant's sister-in-law, testified that on the date in question the defendant told her that he found the check and that she advised him to return it. (Tr. 133-4). About an hour later a friend of the family, Willie Lawrence, came over and "showed the gun". (Tr. 135, 140-1). Gloria further testified that she and her husband told Lawrence not to "play" with the gun because their baby was in the room. (Tr. 135-6, 156). She also testified that later that evening it was Willie Lawrence who advised her husband and herself of her brother-in-law's arrest. (Tr. 131-2, 144).

On cross-examination, Gloria Degraffenried admitted that Willie Lawrence had visited their home before, that she and her husband were as friendly with Lawrence as was the defendant, and that before Lawrence took out the gun the conversation fairly could be classified as "chit chat". (Tr. 147-8, 153). She also testified that the defendant was taking valium pills, but to her knowledge he was not taking any heroin. (Tr. 164).

Palmis Degraffenried, the defendant's brother, testified that as of February 1974 he had known Willie Lawrence for about six or seven months, that the defendant had told him he owed Lawrence some money, and that "John" had purchased valium pills from Lawrence. (Tr. 168-9, 172-3). Palmis stated that, on the day in question, Lawrence visited the apartment, took out a gun and told the defendant that he wanted his money. (Tr. 173). In response, Palmis told Lawrence: "I don't want you doing that here because my wife is here, my baby is here.

You take that outside my door." (Tr. 173-4). According to Palmis, at that point Lawrence and the defendant left the apartment at his "request". (Tr. 174-5).*

Defendant John Degraffenried testified that he worked for Assemblyman Mark Southall, and that in February 1974 he was taking hashish and valium pills, which pills he purchased from Lawrence. (Tr. 185, 189, 193). He denied taking heroin since 1973 and having a heroin habit. (Tr. 190-1). Degraffenried admitted on the stand that he found the check in the staircase, and that his sister-in-law had advised him to turn it in. (Tr. 195-7). He explained that his intention had been to turn the check over to Assemblyman Southall or to a local policeman. (Tr. 198). Degraffenried then set out his contention that Lawrence had come over to the apartment, asked him for a sum of money ($14) which Degraffenried owed (Tr. 199-200), and thereafter pulled the gun and told him that he wanted the $14 without delay. (Tr. 200, 203). Degraffenried admitted that he and Lawrence left the apartment at Palmis Degraffenried's request. (Tr. 202). According to the defendant, once in the street he showed Lawrence the Air Force check and Lawrence suggested that he attempt to cash it at Rite Check Cashing. (Tr. 205-6). Degraffenried admitted that he signed the second endorsement but claimed that he did so knowing Stein would call the police. (Tr. 211, 213). Degraffenried conceded that at one point Lawrence left the check cashing establishment. (Tr. 215-6).

Degraffenried confirmed the basic circumstances surrounding his post-arrest confessions, including the facts that he had been advised of his rights, understood them,

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* Palmis also testified that later that day he was advised of John's arrest by Lawrence. (Tr. 170).

and had admitted that he found the check. (Tr. 217-219). The defendant also testified that on the date of his arrest he didn't tell any law enforcement officer that Lawrence had a gun. (*Id.*). However, Degraffenried claimed that the day after his arrest, prior to being brought to the United States Attorney's Office for arraignment, he advised Agent Altice of the Secret Service that Lawrence had a gun. According to the defendant, Altice told him that nobody would believe that "wild story." (Tr. 221-2), and for this reason Degraffenried never told Assistant United States Attorney Cutner that Lawrence had a gun.* He further testified that Altice was the same agent who had accompanied Agent Terry Chodosh on the day of his arrest. (Tr. 226-7).

The Government's Rebuttal Case

In rebuttal, the Government recalled Special Agent Terry Chodosh who testified that, on the day of his arrest, Degraffenried stated that he had used heroin as recently as the previous week. Chodosh also explained that at the same time he personally observed needle marks

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* Degraffenried's assertion that his statements to law enforcement officials "were not inconsistent with his defense", ignores the fact that he never mentioned or even hinted that Lawrence had a gun to either Inspectors Mackin and Rischiutto, Agent Chodosh, or Assistant United States Attorney Cutner. (Br. 7). Indeed, his defense was riddled with inconsistencies and incongruities, including its basic premise that a family friend would threaten him with a gun for $14. Furthermore, even if the defendant's story was accepted at face value—as it plainly was not by the jury—it failed to meet the rigorous requirements associated with the defense of coercion. (Tr. 275-6). See also, *Gillars* v. *United States*, 182 F.2d 962, 976 and N. 14 (D.C. Cir. 1950); *United States* v. *Palmer*, 458 F.2d 663, 665 (9th Cir. 1972); *R. I. Recreation Centers* v. *Aetna Casualty Co.*, 177 F.2d 603, 605 (1st Cir. 1947); *United States* v. *Chapman*, 455 F.2d 746, 749 (5th Cir. 1972).

on the defendant's arm. (Tr. 235-6). Chodosh further testified that on February 5, 1974, he was accompanied by Agent Altice, but that on the following day, when Degraffenried claimed to have talked to Altice, Chodosh was accompanied by Postal Inspector Rischiutto.*

ARGUMENT

POINT I

The Conduct Of The Trial Judge Was Fair And Impartial.

Degraffenried seeks reversal of his conviction on the alleged ground that he was denied a fair trial by Judge MacMahon. In support of this contention, he claims that the trial judge cast aspersions on the defendant's credibility within the hearing of the jury and that the court's treatment of defense counsel evidenced a bias against defendant. The first claim is uncontrovertibly belied by the trial record; the second claim unduly relies out of context on a heated, but provoked, exchange between Judge MacMahon and defense counsel. Fairly judged in the proper context of the entire record these purported incidents do not create any doubt that Degraffenried was afforded an impartial and fair trial by the experienced District Court Judge.

A. The trial judge did not say "unbelievable" in the presence of the jury.

Degraffenried baldly asserts that "there is no dispute that the trial judge twice used the word unbelievable in the presence of the jury immediately after the defendant

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* Agent Altice was black and Inspector Rischiutto was white. (Tr. 236-7).

testified." (Br. 10-1).* Contrary to defendant's assertion not only are his factual contentions disputed, but the record is uncontradicted that any such comment uttered by the court was not heard by the jury. Accordingly, no conceivable prejudice accrued to the defendant.

The incident complained about by Degraffenried occurred in the following circumstances: the defense case was concluded with the testimony of defendant Degraffenried. The court then declared a brief recess while the Government determined whether it would offer a rebuttal case. (Tr. 227). After the jury left the courtroom, defense counsel moved for a mistrial, asserting that he had just heard the trial judge say "unbelievable, unbelievable"—allegedly with reference to the defendant—as juror no. 7 was passing by, five to seven feet away from the bench. (Tr. 228-9). With the jury outside the courtroom, Judge MacMahon disputed counsel's erroneous assertion and, in language which he later conceded was perhaps too strong, admonished defense counsel as an "outright liar" and a "wiseguy" (Tr. 229, 232).** The trial judge then made clear that his comment had been provoked by defense counsel:

> "The Court: Because you outright misrepresented. I was speaking in a whisper here. I was just admonishing you for your constant disregard of my directions to you, to stop making remarks.
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> * * *
>
> I did not speak loud. I spoke softly." (Tr. 229-30).

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* In his Brief, Degraffenried states that the:

> "[U]nchallenged account of the incident indicates that the judge directed the remark to the Court reporter as the defendant was leaving the witness stand and juror no. 7 was passing within five to seven feet of the judge after a recess had been called. Counsel noted that he heard the judge's comment from as far as thirty feet away" (Tr. 228-9) (Br. 11).

** Judge MacMahon also referred to defense counsel as an "accomplished incompetent" and a "punk". (Tr. 229, 230). It is clear that none of these characterizations were heard by the jury. See *infra* at pp. 11-12.

At this juncture, defense counsel, recognizing that he had acted unwarrantedly, immediately withdrew his application for a mistrial and "apologize[d] to the Court." (Tr. 230).

Counsel for the Government then urged that the trial continue in light of (1) counsel's withdrawal of the application, (2) the unlikelihood that the jury heard the Court's comment, and (3) the waste of the Court's time associated with a retrial.* (Tr. 231). Nevertheless, the trial court indicated its willingness to grant the mistrial application rather than leave open for a potential issue on appeal a claim of bias which simply had no basis in the record:

> "The Court: But better we waste it [the time], than we have this kind of any issue in the case. *It is just wholly irrelevant to anything to do with justice. It is an outright misrepresentation on Mr. Thau's* [defense counsel] *part. I don't want any part of such a fraudulent record.*" (Tr. 231). (Emphasis supplied).**

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* Degraffenried's claim that "neither the trial court nor the Assistant U.S. Attorney challenged these facts as recounted by defense counsel" is simply inaccurate. (Br. 11). Judge MacMahon pointed out on no less than three occasions that he "was speaking in a whisper", that he "spoke softly", and that it was "an outright misrepresentation on Mr. Thau's part." (Tr. 229, 230, 231). Similarly, counsel for the Government, referring to the alleged "unbelievable" comment, stated that "I was certainly present and I feel confident the jury couldn't hear it. . . ." (Tr. 231).

** Regrettably, Judge MacMahon's omniscient comment was fulfilled on this appeal. Notwithstanding defendant's and his counsel's explicit waiver of the point when offered the alternative of a mistrial, and the overwhelming proof of Degraffenried's guilt, this incident has been assigned as the principal error on appeal. As we make clear below, see *infra* at 13-14, not only does Degraffenried's clear waiver preclude assertion of the incident on appeal, but his effort to have "two bites of the apple" amounts to an improper and unfair attempt to mislead the District Court into error.

Mr. Thau reiterated his apology, conceded that he had acted "out of some kind of paranoia" and again explicitly withdrew his application for a mistrial. He stated:

> "We waive that particular issue for appellate purposes. I have discussed it with Degraffenried. I don't think it is an important issue in the case." (Tr. 231-2).

Notwithstanding the entreaties of counsel for both the Government and defendant that the trial proceed, Judge MacMahon insisted on both a further inquiry of the defendant and a "voir dire" of the jury to determine whether any of its members heard "the comments of counsel or the bench during any of the bench conferences." (Tr. 233). The judge persisted in making this inquiry of the jury even though defense counsel repeated the waiver of any appellate issue and twice expressly stated that "there would not be any need for [voir dire of the jury]." *

After the foregoing colloquy, the trial court recalled the jury and made the following inquiry:

> "The Court: Have any of you heard anything that has been said here at the bench when I have had counsel up here? *Have any of you heard anything that I have said or that counsel have said?*" (Tr. 234). (Emphasis supplied).

The only response was by Juror No. 4, who stated: "Well, I heard you say 'stop it', I think or some such thing." (*Id.*). Only after the trial judge determined that this was the only comment overheard and that it was suffi-

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* Counsel reiterated "I am not even asking for a voir dire . . ." (Tr. 233, 234).

ciently innocuous, did he permit the trial to proceed. (*Id.*).*

Thus, contrary to Degraffenried's claim, the record is uncontradicted and unambiguous that no juror heard the Court say "unbelievable." This puts the instant case on an entirely different footing from the cases upon which Degraffenried relies. See *e.g.*, *Quercia* v. *United States*, 289 U.S. 466 (1933); *United States* v. *Persico*, 305 F.2d 534 (2d Cir. 1962); *United States* v. *Brandt*, 196 F.2d 653 (2d Cir. 1952); *United States* v. *Woods*, 252 F.2d 334 (2d Cir. 1958); *United States* v. *Grunberger*, 431 F.2d 1062 (2d Cir. 1970); Compare *United States* v. *Sclafani*, 487 F.2d 245, 256 (2d Cir.), *cert. denied*, 414 U.S. 1023 (1973); *United States* v. *Boatner*, 478 F.2d 737, 741 (2d Cir.), *cert. denied*, 414 U.S. 848 (1973). *See also*, *United States* v. *Arraujo*, 539 F.2d 287, 290-1 (2d Cir. 1976).

Moreover, the court was meticulous in its inquiry of the jury to determine if any of its members had overheard the comment and insisted on pursuing the inquiry, even though defendant had expressly waived the issue

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* Degraffenried argues that Judge MacMahon's *voir dire* does not finally dispose of his contention because the trial court referred to comments at the bench rather than the Court's alleged characterization of defendant's testimony. This contention overlooks the fact that Judge MacMahon specifically inquired "Have any of you heard anything that I have said . . .?" Moreover, it simply strains credulity to accept that the one juror who responded to the court's questions would have remembered a comment made earlier than the disputed "unbelievable" remark, but made no mention of the latter comment, if it in fact had been heard by anyone. Finally, to have pursued the specific inquiry now proposed by appellate counsel would have suggested to the jury that Judge MacMahon in fact had made a comment characterizing Degraffenried's testimony, which itself might have created some prejudice where none otherwise existed.

for appeal and had disclaimed the need for a *voir dire*. (Tr. 231-4). Indeed, Judge MacMahon followed the very procedures recommended by the authorities recited by Degraffenried. See *United States* v. *Green*, 429 F.2d 754, 761 (D.C. Cir. 1970); *cf. Young* v. *United States*, 346 F.2d 793, 796 (D.C. Cir. 1965). In these circumstances, Degraffenried's present challenge to the adequacy of the *voir dire* comes with particular ill-grace.*

Finally, Degraffenried's claim in this Court is totally improper, given his conscious decision at trial to waive the issue on appeal. This is not an instance of waiver by silence or inadvertence. See *e.g. United States* v. *Grunberger*, *supra*, 431 F.2d at 1068-9 (2d Cir. 1970). Defense counsel was an experienced trial practitioner who decided, after consultation with his client, that it was appropriate to withdraw the application for a mistrial (Tr. 229-232).** Furthermore, the trial judge already

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* It bears special emphasis that the *voir dire* revealed that the Court was correct—and defense counsel incorrect—in the view that none of the jurors could or did hear the challenged utterance.

** Degraffenried misleadingly suggests that the waiver was "tainted by the Hobson's choice which the trial judge offered the defendant." (Br. 20). Even though there already had been an express waiver of any appellate issue, and the motion for a mistrial had been withdrawn, the Court made a further inquiry of defendant:

> "The Court: Mr. Degraffenried, what do you say? Do you want a new trial with a new lawyer or do you want to go on with this one?" (Tr. 232).

Given the fact that defendant had already waived any claim on appeal and had withdrawn his motion, the court could have proceeded without making this inquiry; thus, the court provided the defendant with more options than he was entitled to under the circumstances.

Moreover, Degraffenried's present argument that his waiver was coerced by the prospect of a retrial with a new lawyer before

[Footnote continued on following page]

had decided to grant Degraffenried's application to assuage any possible misconceived notion on defendant's part that he was denied a fair trial. To permit or condone appellate counsel's *post hoc* attempts to renege on such waivers would gravely and substantially undermine the trial judge in his determination of the proper course of conduct for the trial. *Cf. United States* v. *Wisniewski*, 478 F.2d 274, 285 (2d Cir. 1973). Indeed, in the context of this case, where defendant was offered at trial—but expressly declined—the specific relief he now seeks after a conviction, to countenance this claim is an invitation to absolute abuse of the trial court's right and need to rely upon counsel's guidance and representations, and it should be rejected by this Court.

B. The trial judge's conduct did not prejudice the defense.

Degraffenried contends that certain of the trial judge's remarks were intemperate and warrant reversal of his conviction. (Br. 23). A review of the record, however, reveals that the trial judge acted fairly and without partisanship throughout the trial, and that any "heated"

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the same judge, is plainly inapposite. First, if Degraffenried, albeit without justification, truly felt prejudiced, he could have moved for Judge MacMahon's recusal at a retrial, see 28 U.S.C. §§ 144, 455, and thus properly have preserved the point for appellate review if his motion was denied. Second, as events developed at trial it is plain that there would have been no obstacle to Mr. Thau's continued representation of Degraffenried before Judge MacMahon, *Cf. United States* v. *Rosa*, 493 F.2d 1191, 1193-4 (2d Cir.), *cert. denied*, 419 U.S. 850 (1974). Finally, the presumed point of defendant's motion was to cure the alleged taint of the district court's comments on the jury then hearing the case. Defendant's willingness to proceed with the same jury manifests the true lack of conceivable prejudice feared from the judge's alleged comments.

remarks were provoked by the comments of defense counsel.

In particular, Degraffenried assails the District Court's admonition of trial counsel, uttered at the side bar, to "stop it." Judged in the context in which they occurred, this comment and the ones that followed hardly manifest a bias against defendant.

During the cross examination of Palmis Degraffenried, Government counsel attempted to elicit as a motive for the crime the fact that defendant needed money to finance a heroin habit and that the witness had observed track marks on the defendant's arm. Thus, Palmis was asked:

> "While you were living with your brother, did he ever walk around the apartment without his shirt on?" (Tr. 179).

Defense counsel immediately interposed the following objection:

> "Mr. Thau: Objection. *It is not a nudity case or obscenity case.*" (Tr. 179). (Emphasis supplied.)

The trial Judge then called a bench conference to admonish counsel for the remark. In the ensuing colloquy at the side bar the following exchange took place:

> "The Court: Mr. Thau, come up.
>
> (At side bar.)
>
> The Court: I want you to quit making those remarks. I know that other judges must let you get away with this, but if you do it once more I am going to hold you in contempt. Now, you stop it.

You know better. You have been around here for four or five years. If you have got an objection, make it. Don't stand up and say, 'This isn't a nudity case.' I know this isn't a nudity case. Now don't do it again. You may be Legal Aid, but that doesn't mean a damn thing to me. You stop it.

Mr. Thau: I am not taking special license—

The Court: You stop it.

Mr. Thau: May the record show that you have said this so loudly that even though it is at the bench it is within the hearing of the jury?

Mr. Schatz: I strongly disagree.

The Court: You are just an outright liar.

Mr. Thau: I beg your pardon?

The Court: Proceed.

Mr. Thau: I hope that is on the record.

The Court: I hope it is, too.

Mr. Thau: I move for a mistrial on the statement just made by the Court that I was an outright liar.

Mr. Schatz: It is clear to me that the jury did not hear your Honor's comments.

The Court: Of course not." (Tr. 179-80).

While admittedly some of the trial court's expressions were better left unsaid, the comments were not sufficiently harsh or powerful to have interfered with counsel's forceful representation of Degraffenried, nor did they indicate a bias of any sort against defendant on the part of the District Judge. Indeed, Judge MacMahon's comments were clearly provoked by the unnecessary and patently improper remarks of defense counsel which tended to

demean the seriousness of the trial itself. See *United States* v. *McCarthy*, 473 F.2d 300, 307 (2d Cir. 1972); *United States* v. *Weiss*, 491 F.2d 460, 468 (2d Cir. 1974); *United States* v. *Sclafani*, *supra*, 487 F.2d at 256.

Furthermore, as the subsequent *voir dire* of the jury revealed, the only comment that was overheard was the Judge's admonition to trial counsel to "stop it." (Tr. 234). It can hardly be claimed that this comment itself rises to the level of reversible error; indeed, this Court has affirmed convictions where a trial court's conduct was substantially more problematical than here. See, *e.g.* *United States* v. *Boatner*, *supra*; *United States* v. *Sclafani*, *supra*; *United States* v. *Head*, 546 F.2d 6 (2d Cir. 1976); *United States* v. *Weiss*, *supra*.

Moreover, with the exception of the few exchanges between counsel and the court alluded to previously, Judge MacMahon's conduct of the trial was exemplary. There is no claim that the trial judge was anything but even-handed in his rulings on objections and on the admissibility of evidence. *Compare United States* v. *Ah Kee Eng*, 241 F.2d 157 (2d Cir. 1957). Unlike much of the authority relied on by Degraffenried, Judge MacMahon did not repeatedly interrupt defense witnesses in order to highlight weaknesses in their testimony or to usurp the role of counsel. See *e.g.*, *United States* v. *Brandt*, 196 F.2d 653 (2d Cir. 1952); *United States* v. *Gugliemi*, 384 F.2d 602, 605 (2d Cir. 1967); *United States* v. *DeSisto*, 289 F.2d 833, 834 (2d Cir. 1961); *United States* v. *Nazzaro*, 472 F.2d 302, 307 (2d Cir. 1973). Nor is this a case in which the judge told the jury in his charge that he believed that the defendant lied or that the defendant was guilty. See *Quercia* v. *United States*, 289 U.S. 466 (1933); *United States* v. *Woods*, 252 F.2d 334,

336 (2d Cir. 1958).* On the contrary, in his charge to the jury, Judge MacMahon was scrupulous in instructing the jury that they must decide the case solely on the basis of the evidence adduced at trial:

> "I have no opinion one way or the other as to what the outcome of this case should be. That decision is up to you and you are not to infer from any ruling that I have made here or any directions that I have given to either lawyer that I have any opinion one way or the other."

He further cautioned:

> I want to caution you, however, that this case like any other trial, is a search for the truth. It isn't a contest between lawyers, so don't judge it by their relative skills. You have to judge the case." (Tr. 264)

Thus, even had an impression of partisanship been conveyed to the jury—and the record makes clear that none was—it was surely cured by the trial court's charge. See *e.g.*, *United States* v. *Boatner*, *supra*, 478 F.2d at 741; *United States* v. *Pellegrino*, 470 F.2d 1205, 1207-8 (2d Cir. 1972), *cert. denied*, 411 U.S. 918 (1973), *cf. United States* v. *Salazar*, 293 F.2d 442 (2d Cir. 1961), *United States* v. *Brandt*, *supra*.**

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* As our discussion in the text indicates, a review of the authorities relied upon by Degraffenried reveals that those cases involved improprieties which were a far cry from the conduct of the trial judge in this case.

** Degraffenried apparently takes issues with that portion of the court's charge on the issue of credibility, which reads: "was the witness giving you straight answers to straight questions or was he just parroting answers? Was the lawyer putting words in his mouth?" (Tr. 267).

[Footnote continued on following page]

Finally, in determining any possible prejudice to Degraffenried, the strength of the case must be considered. *See e.g., United States* v. *Boatner, supra*, 478 F.2d at 742; *United States* v. *Head, supra*. Here, the evidence of Degraffenried's guilt was overwhelming. He was apprehended at the scene of the crime and gave a full confession without any mention of being coerced. His own version of the events was permeated with inconsistencies and was inherently suspect. Moreover, beside its intrinsic incredibility, Degraffenried's defense was legally insufficient to have established coercion. On this record it simply strains credulity to suggest that the trial court's comments in any way could have affected the jury's verdict.

In sum, the few comments challenged here, were not made in the presence of the jury, were provoked by the conduct of defense counsel, did not hamper the conduct of the defense in any way, and did not manifest any bias against the defendant who was accorded a fair and impartial trial.

This instruction was perfectly proper. On its face, the comment does not favor either side. The Court was merely trying to give the jury guidance in its determination of credibility. It is simply impossible to understand how Degraffenried claims this instruction operated to his detriment: a careful review of the judge's charge on credibility reveals that it was fair to both sides. (Tr. 266-7).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

STEVEN M. SCHATZ,
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Assistant United States Attorneys,
Of Counsel.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Steven M. Schatz being duly sworn deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 25th day of April, 1977 he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

Barry H. Garfinkel, Esq.
Skadden, Arps, Slate, Meagher & Flom
919 Third Avenue
New York, N.Y. 10022

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at the United States Courthouse Annex, 1 St. Andrew's Plaza, Borough of Manhattan, City of New York.

Steven M. Schatz

Sworn to before me this
25th day of April 1977

Mary L. Avent

MARY L. AVENT
Notary Public, State of New York
No. 03-4500237
Qualified in Bronx County
Cert. filed in Bronx County
Commission Expires March 30, 1978